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No. 721

In the

Supreme Court of the United States

OCTOBER TERM, 1965.

FRANCIS DeROSA,

Petitioner,

vs.

ELMER J. SCHNACKENBERG, ROGER S. KILEY and LUTHER M. SWYGERT, Circuit Judges,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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No.

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ELMER J. SCHNACKENBERG, ROGER S. KILEY and LUTHER M. SWYGERT, Circuit Judges,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner, Francis DeRosa an Illinois citizen, prays that a Writ of Certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit (hereinafter the "Court of Appeals") entered May 24, 1965 which reversed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, without remanding, and its subsequent order denying rehearing.

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals is reported under the title *DeRosa* v. *Aetna Insurance Company* (1965) 346 F. 2d 245, and is printed in the appendix hereto (A. 1a). A related opinion is *Century Indemnity Co.* v. *Serafine* (CA 7 1963) 311 F. 2d 676.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 24, 1965 (A. 6a). The order denying rehearing was entered on July 6th, 1965. (A. 7a). A timely application for extension of time to file a petition for Writ of Certiorari was presented to the Honorable Tom C. Clark, Associate Justice of the United States Supreme Court and Circuit Justice for the Seventh Circuit and his order granting an extension to November 3rd, 1965 was entered on October 4, 1965 (A. 8a).

QUESTIONS PRESENTED.

1. May a Court of Appeals simply ignore an aspect of a case which has colored the history of the litigation and which has been briefed and argued by the parties on appeal, thereby denying to a party effective appellate review?

2. May a Court of Appeals, by its negative action in ignoring an important aspect of a case, effectively decide that aspect of the case in clear contradiction of prevailing State law?

STATUTES INVOLVED.

Rule 52, Federal Rules of Civil Procedure (A. 9a).

STATEMENT OF THE CASE.

This is a personal injury case with a long and complicated history. Century Indemnity (the predecessor of Aetna Insurance Company) insured Serafine. DeRosa was injured while riding a horse owned by Serafine. A year after the injury, DeRosa sued Serafine in the Superior Court of Cook County. Century declined to defend Serafine on the ground of late notice, and retained attorneys who filed a declaratory judgment action in the United States District Court seeking to avoid its obligations under the insurance policy.

In preparation for the declaratory judgment action, Century took a statement of Serafine, and its attorneys caused Serafine's deposition to be taken. The declaratory judgment action went to trial, during which Serafine testified. This trial resulted in judgment for Serafine, the insured, and against Century, the insurer, which judgment was appealed by Century and affirmed by the Court of Appeals for the 7th Circuit under the title *Century Indemnity Company* v. *Serafine,* 311 F. 2d 676 (7th Cir., 1963). In apparent compliance with the judgment of the Court of Appeals, Aetna (successor to Century) caused its attorneys to appear in the Superior Court of Cook County as attorneys for the defendant, Serafine, in the action commenced by DeRosa.

In preparation for the trial of the cause of *DeRosa* v. *Serafine,* Aetna's attorneys did nothing. Subsequently, when said cause was reached for trial, Aetna's attorneys notified Serafine of the trial, and of the fact that they desired his attendance and testimony. He referred them

to his personal attorneys, who had defended him against Aetna's attorneys in the prior declaratory judgment proceedings.

A holiday weekend intervened, during which Serafine was out of the City. The attorney for DeRosa, at expense to himself, located Serafine and caused him to be subpoenaed as a witness in the trial. Serafine did appear and did testify as an adverse witness under Illinois procedure, and did take the stand as a witness in his own behalf when called by Aetna's attorneys who were ostensibly defending him.

After a verdict in the Superior Court in favor of DeRosa and against Serafine, Aetna's attorneys filed a second declaratory judgment action alleging lack of cooperation by Serafine in his alleged failure to appear and to testify in the Superior Court trial. These were the same attorneys who had filed the previous declaratory judgment action, taken the prior appeal to the Court of Appeals, and then appeared in the Superior Court of Cook County as attorneys for Serafine!

It is this second declaratory judgment action which has been reviewed in the Court of Appeals and is now presented to this Court on this Petiton for Writ of Certiorari.

The relief sought by Aetna in the second declaratory judgment action was denied and the cause went to trial on the counterclaim of DeRosa for a declaration that Aetna owed DeRosa the amount of the judgment in the Superior Court. The District Judge entered judgment in accord with DeRosa's counterclaim and the Court of Appeals reversed without remanding for the sole reason that in the opinion of the Court of Appeals, Serafine had not complied with the policy provisions requiring his cooperation with the insurer due to his failure to respond to their attorneys' request to appear and testify. Contrary to what is referred to in the opinion as the "implied finding" of the trial.

REASONS WHY THE WRIT SHOULD BE GRANTED.

For the following reasons this Court should exercise its sound judicial discretion and grant the Writ:

I.

THE DECISION OF THE COURT OF APPEALS TOTALLY IGNORES AN IMPORTANT AND UNRESOLVED ASPECT OF THIS CASE, THUS EFFECTUALLY DEPRIVING PETITIONER OF APPELLATE REVIEW ON THAT ASPECT OF THE CASE.

The history of this case reveals the conflict between Aetna and its insured from the very beginning.

At the inception of the litigation between DeRosa and Serafine, the insurer declined a defense to the insured. The insurer then took the insured's statement, and retained attorneys who filed an action seeking to avoid any obligation to the insured. Certainly, at this point, both the insurer and its attorneys were in obvious and open conflict of interest with the insurer. The action so filed resulted in the taking of the insured's deposition and his testimony on trial with all of the concomitant cross examination, argument and bitterness engendered in such a conflict.

After an adverse decision in the trial court, the insurer continued its efforts to avoid its obligation to the insured in the Court of Appeals, where it was again unsuccessful.

The next time the insured heard from his insurer, which had now been ordered by the Court of Appeals to defend him, was when the cause originally giving rise to their conflict was on trial and he received a phone call from the same attorneys who had previously been so bitterly antagonistic to him.

It is apparent throughout the entire record of this cause that there was ample reason for Serafine's reluctance to comply with any request from these attorneys.

Yet, this reluctance is the basis of the opinion and judgment of the Court of Appeals which ignored the history of this litigation, the arguments advanced by this Petitioner in his Brief and Petition for Rehearing in the Court of Appeals, decided the cause without reference to this important aspect of it, and reversed the experienced trial judge who had heard the testimony and seen the witnesses.

The effect of the opinion and judgment of the Court of Appeals is a decision that the good faith of the insurer is of no importance when the question of the insurer's cooperation is raised.

II.

THE COURT OF APPEALS IN EFFECT HAS RENDERED A DECISION ON AN IMPORTANT STATE QUESTION IN CONFLICT WITH THE CLEAR ILLINOIS LAW.

The Illinois cases have been uniform in holding that when the cooperation clause of an insurance policy is construed, good faith is required on the part of both insurer and insured. *Kankakee Auto Leasing* v. *Hemphill,* 21 Ill. App. 2d 179 (Abst.) (1959); *Panczko for the Use of Enright* v. *Eagle Indemnity Co.,* 346 Ill. App. 144 (1952); *Gregory* v. *Highway Ins. Co.,* 24 Ill. App. 2d 285 (1960); and *Duffy* v. *Fort Dearborn Cas.,* 270 Ill. App. 143 (1933).

And, in Illinois, an insurer has been held to waive its right to urge lack of cooperation by its own bad faith where there was a conflict of interest between the insured and the insurer and the insured's attorneys represented both parties. *Allstate Insurance Co.* v. *Keller,* 17 Ill. App. 2d 44 (1948). The Illinois Appellate Court in that case

quoted from *American Employers Ins. Co.* v. *Goble Aircraft Specialties, Inc.*, 205 Misc. 1066, 131 N.Y.S. 2d 393 (1954), as follows:

> "The Canons of Professional Ethics make it pellucid that there are not two standards, one applying to counsel privately retained by a client, and the other to counsel paid by an insurance carrier. Canons 6, 45, Appendix, McKinney's Judiciary Law. If the interests of the carrier and the assured are or are likely to become diverse, he cannot represent both. 'Divided obligations in trust relations are obnoxious to the law, and in none more so than in that of attorney and client.' *People* v. *People's Trust Co.*, 180 App. Div. 494, 167 N.Y.S. 767, 768."

And the Illinois Appellate Court went on to say in its own language:

> "Where an insurer's attorney has reason to believe that the discharge of his duties to his client, the insured, will conflict with his duties to his employer, the insurer, it becomes incumbent upon him to terminate his relationship with the client. *Reynolds* v. *Maramorosch*, 208 Misc. 626, 144 N.Y.S. 2d 900 (1955); *Helm* v. *Inter Insurance Exchange*, 354 No. 935, 192 S.W. 2d 417 (1946); *Hammett* v. *McIntyre*, 114 Cal. App. 2d 148, 249 P. 2d 885 (1952)."

It is respectfully and earnestly submitted that the Court of Appeals, by ignoring the entire history of the bitter antagonism between Aetna's attorneys and Aetna's insured, has failed to give effect to the many explanations in the record for any apparent failure of the insured to cooperate with the insurer and has in effect rendered a decision flatly contradictory to controlling Illinois law.

CONCLUSION.

For the foregoing reasons, it is respectfully urged that this Court grant the Writ of Certiorari requested by the Petitioner.

Respectfully submitted,

JOHN G. PHILLIPS
Counsel for Petitioner

JONES & CLARK,
VINCENT M. CLARK,
Of Counsel

APPENDIX.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1964—APRIL SESSION, 1965

No. 14757
FRANCIS DEROSA,
Counter-Plaintiff, Appellee,
v.
AETNA INSURANCE COMPANY,
Counter-Defendant, Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

May 24, 1965

Before SCHNACKENBERG, KILEY, and SWYGERT, *Circuit Judges.*

SWYGERT, Circuit Judge. This is an appeal from a judgment in favor of counter-plaintiff Francis DeRosa against counter-defendant Aetna Insurance Company for $25,000. In a prior state court action DeRosa had recovered a judgment for this amount against Dan Serafine, the insured under a policy of casualty insurance issued by The Century Indemnity Company. In his suit against Serafine, DeRosa claimed that his back had been injured on November 20, 1957, while riding a horse owned by Serafine.

Although the accident occurred in 1957, Serafine did not inform Century until 1959 that DeRosa was asserting a claim against him. After the state court action was

instituted in March, 1959, Century filed an action in the federal district court for a declaratory judgment that it need not defend Serafine, its insured, because of his untimely notice of the claim asserted against him. The district court found against Century and this court affirmed. *Century Indem. Co.* v. *Serafine*, 311 F.2d 676 (7th Cir. 1963).

Following the termination of the federal court declaratory action, Aetna, successor to Century, undertook Serafine's defense in DeRosa's case against him in the Superior Court of Cook County, Illinois. In that proceeding, after a jury trial, DeRosa recovered a judgment against Serafine for $25,000. Thereafter, Aetna filed the present declaratory judgment action in the federal district court, requesting that it be absolved from liability under its policy because of Serafine's failure to cooperate in the trial in the state court. DeRosa moved to dismiss the complaint on the ground that the issue was res judicata and on the further ground that the issue could be resolved in a garnishment action against Aetna by DeRosa. The motion to dismiss was granted. At the same time DeRosa filed a counterclaim under three separate theories: garnishment, recovery under the Insurance Code of Illinois, and recovery under the terms of the policy. Following a trial on the counterclaim, the district court entered judgment ordering that DeRosa recover from Aetna the full amount of the judgment which he had obtained against Serafine in the state court.

Aetna appeals on two bases: (1) that the evidence before the court proved that Serafine did not cooperate with counsel in defending the DeRosa suit, thus breaching a condition of the policy which required him to assist in the conduct of the defense and (2) that the district court erred in refusing to allow Aetna to present certain evidence which would have constituted further proof of DeRosa's failure to cooperate.

The evidence before the district court showed that on May 27, 1963, the law firm representing Serafine under the policy with Aetna telephoned him that the case in the

Superior Court of Cook County was going to trial and asked him to attend. Serafine said that he was leaving town and could not be present. He suggested that if the law firm wanted to pursue the matter further, it should contact his personal attorney. A phone call to Serafine's attorney did not produce the cooperation of the insured or his attendance at the trial. Aetna offered to prove that Serafine's personal attorney said that he would look into it. Aetna also made an offer of proof that when reminded of Serafine's duty of cooperation and attendance at trial, the attorney replied, "We have gone into that issue before." The judge refused both offers.

DeRosa's case against Serafine was assigned for trial on May 28, 1963, and evidence began on May 29. Serafine did not communicate with the lawyers furnished by Aetna to defend him until he appeared in the court on the morning of June 3. He was in the company of DeRosa's attorney and became the last witness for the plaintiff.

We think these facts alone are sufficient to show such a failure on the part of Serafine to cooperate with his insurer as to preclude Aetna from liability for the judgment against its insured. Having made this determination, we need not rule on the alleged error of the district court in failing to admit additional evidence of Serafine's conduct.

Under Illinois law, the general rule of garnishment is that a judgment creditor cannot recover against the insurer if the insurer himself could not have recovered upon the insurance contract. *Schneider* v. *Antoist Mut. Ins. Co.*, 346 Ill. 137, 178 N.E. 466 (1931); *Jones* v. *Mfr's. Cas. Ins. Co.*, 313 Ill. App. 386, 40 N.E.2d 545 (1942). Moreover, the Illinois Insurance Code, Ill. Rev. Stat. ch. 73 ¶ 1000, specifically provides that recovery by an injured person in a direct suit against the insurer under the terms of the policy is "subject to all the conditions thereof." The terms of the policy issued to Serafine specify that "The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings and

trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits." The policy further provides that "No action shall lie against the company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this Policy. . . ."

The evidence shows that Serafine did not cooperate with the lawyers furnished by Aetna in the defense against DeRosa's claim. His failure, without acceptable excuse, to attend the trial until he appeared in response to DeRosa's subpoena, could only result in serious prejudice to the defense efforts furnished by Aetna. This conduct materially breached the condition in the policy requiring Serafine to attend the trial and assist in conduct of the defense. This breach precludes recovery by DeRosa whether it be sought under the policy, under the insurance code, or by way of garnishment.

DeRosa urges that even though it be determined that Serafine failed to cooperate with his insurer, Aetna waived this defense by reason of its continuing to defend the action with knowledge of Serafine's conduct. We do not agree. When an insured does not appear at trial, his insurer need not withdraw in order to preserve its defense of noncooperation. *Durbin for Use of Ferdman* v. *Lord,* 329 Ill. App. 333, 68 N.E.2d 537 (1946). This rule is logical and reasonable. Without it, the insurer would be required to elect at its peril to proceed with the defense or to withdraw. If the insurer should decide to withdraw and if there should be a later determination that there was no failure to cooperate, the insurer would be without means to defend on the merits the principal suit against its insured. By proceeding to trial, Aetna did not waive a valid defense against its insured. That defense is equally effective to defeat a claim by a third party as it would be to defeat a claim by the insured himself.

The judgment of the district court is reversed.

KILEY, *Circuit Judge*, concurring.

I concur in Judge Swygert's opinion that the judgment of the district court should be reversed. In the absence of Serafine's explanation why he failed to appear when requested by defense attorney representing him in the Superior Court, the District Court's implied finding against Aetna on the issue of failure to cooperate is clearly erroneous. And DeRosa had the burden of going forward with any explanatory testimony in view of the testimony for Aetna.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60610

Monday, May 24, 1965

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

FRANCIS DEROSA,
Counter-Plaintiff, Appellee,
No. 14757 v.
AETNA INSURANCE COMPANY,
Counter-Defendant, Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

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This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Reversed, with costs, in accordance with the opinion of this Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois, 60610

Tuesday, July 6, 1965

Before:

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Roger J. Kiley, Circuit Judge

Hon. Luther M. Swygert, Circuit Judge

FRANCIS DEROSA,
Counter-Plaintiff, Appellee,

No. 14757 v.

AETNA INSURANCE COMPANY,
Counter-Defendant, Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It Is Ordered by the Court that the petition for a rehearing of this cause filed by appellee be, and the same is hereby, Denied.

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1965

FRANCIS DEROSA,
Petitioner
v.
AETNA INSURANCE COMPANY

Order Extending Time To File Petition For Writ Of Certiorari

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 3rd, 1965

/s/ Tom C. Clark
Associate Justice of the Supreme Court of the United States

Dated this 4th
day of October, 1965

RULE 52(a)

FEDERAL RULES OF CIVIL PROCEDURE

RULE 52.

FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b). As amended Dec. 27, 1946, eff. March 19, 1948; Jan. 21, 1963, eff. July 1, 1963.